BBC ESTATE V SDN BHD & ORS A

v.

TR MADEL ANAK KANDOU & ORS

COURT OF APPEAL, PUTRAJAYA B
MOHD GHAZALI YUSOFF JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: Q-02-1116-05]
11 DECEMBER 2007 C

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Land - Native customary rights - Whether action unsustainable - Whether pleadings disclosed facts meriting trial of action - Rules of the High Court 1980, O. 18 r. 19* D

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Striking out claim - Whether action unsustainable - Whether pleadings disclosed facts meriting trial of action - Rules of the High Court 1980, O. 18 r. 19* E

This was an appeal by the defendants against the decision of the High Court judge dismissing their application to strike out the plaintiffs' claim seeking, *inter alia*, a declaration that the plaintiffs had acquired native customary rights over certain parcels of land ('said land'). The defendants argued that the plaintiffs' action was F unsustainable since the defendants were the registered owners of the said land and, therefore, had acquired indefeasible titles to the said land.

Held (dismissing the appeal) G
Per KN Segara JCA delivering the judgment of the court:

(1) From the statement of claim, it was clear that the plaintiffs were claiming that their native customary rights over the said land had been lawfully created prior to 1 January 1958 and H still subsisted as such land and was, thus, Native Customary Land. The defendants had not shown that the plaintiffs had surrendered their native customary rights over the said land. There was also no evidence adduced by the defendants that such native customary rights had been terminated or that I compensation had been paid to the plaintiffs. An application to strike out an action under O. 18 r. 19 of the Rules of the

A High Court 1980 should not descend into a trial on affidavits. What the court should be concerned with was to determine whether the pleadings disclosed facts which merited a trial of the action, and the plaintiffs' statement of claim herein clearly disclosed facts which did merit such trial. (paras 18 & 19)

B

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan-defendan menentang keputusan hakim Mahkamah Tinggi menolak permohonan mereka untuk membatalkan tuntutan plaintif-plaintif memohon, antara lain, deklarasi bahawa C plaintif-plaintif telah memperolehi hak-hak adat anak watan di atas beberapa bahagian tanah ('tanah tersebut'). Defendan-defendan menghujah yang tindakan plaintif-plaintif tidak boleh dibenarkan kerana defendan-defendan merupakan tuan punya yang didaftar tanah tersebut dan, oleh itu, telah memperolehi hakmilik yang tidak D boleh sangkal di atas tanah tersebut.

Diputuskan (menolak rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

E

(1) Mengikut pernyataan tuntutan, ia jelas bahawa plaintif-plaintif menuntut yang hak-hak adat anak watan mereka terhadap tanah tersebut telahpun diwujudkan sebelum 1 Januari 1958 dan masih kekal sebagai tanah sebegitu dan adalah, oleh itu, F Tanah Adat Anak Watan. Defendan-defendan tidak menunjukkan bahawa plaintif-plaintif telah menyerahkan hak-hak adat anak watan mereka di atas tanah tersebut. Tiada juga apa-apa keterangan yang ditunjukkan oleh defendan-defendan bahawa hak-hak adat anak watan sebegitu telah ditamatkan G atau pampasan telah dibayar kepada plaintif-plaintif. Sesuatu permohonan untuk membatalkan satu tindakan di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 tidak sepatutnya menjadi sebuah perbicaraan berdasarkan afidavit. Apa yang seharusnya difikirkan oleh mahkamah ialah penentuan sama ada H pliding mempunyai fakta-fakta yang bermerit perbicaraan tindakan tersebut, dan pernyataan tuntutan plaintif dengan jelasnya mempunyai fakta-fakta yang bermerit perbicaraan sebegitu.

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Case(s) referred to:
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Legislation referred to:
Federal Constitution, art. 13
Land Code (Cap 81) (Sarawak), ss. 2, 13(1), 15(1), 132(1)
Rules of the High Court 1980, O. 12 rr. 4(b), 6, 7, O. 18 r. 19

For the appellants - Henry Ling Kuong Meng; M/s Ling & Wong
For the respondents - Baru Bian; M/s Baru Bian

[Appeal from High Court, Bintulu; Suit No: 22-2-2005]

Reported by Suresh Nathan

JUDGMENT

KN Segara JCA:

[1] The five plaintiffs, representing themselves and 79 other family units of Rumah Madel, filed a writ of summons together with a statement of claim on 2/2/2005 in the High Court in Sabah and Sarawak at Bintulu (Suit no. 22-2-2005(BTU)) against the five defendants claiming, *inter alia*:

a) a declaration that the plaintiffs have acquired native customary rights over the said land marked in the map attached to the statement of claim;

b) a declaration that this right precludes the 1st, 2nd, 3rd and 4th defendants and or their servant(s) and/or agent(s) and/ sub-contractor(s) and/or assignee(s) from impairing or abridging the plaintiffs' native customary rights;

c) a decree of perpetual injunction against the 1st, 2nd, 3rd and 4th defendants restraining them and or their servant(s) and/or agent(s) and/or sub-contractor(s) and/or assignee(s) from further trespassing on the said land;

d) a declaration that the issuance by the 5th defendant of Lots 20, 21, 22 and 23 to the 1st, 2nd, 3rd and 4th defendants, respectively (that parts of Lots 20, 21, 22 and 23 which extend onto plaintiffs' said land), without first extinguishing the native customary rights over the said land was null and void;

e) a declaration that the issuance by the 5th defendant of Lots 20, 21, 22, and 23 to the 1st, 2nd, 3rd and 4th defendants, respectively (that parts of Lots 20, 21, 22 and 23 which extend onto the plaintiffs' said land, without paying the plaintiffs' any compensation in accordance with the provisions of the Land Code, Sarawak, is null and void;

f) further and/or in the alternative, a declaration that the issuance of Lots 20, 21, 22 and 23 to the 1st, 2nd, 3rd and 4th defendants, respectively, without paying the plaintiffs adequate compensation, was unconstitutional, against art. 13 of the Federal Constitution and therefore, null and void;

[2] The 1st, 2nd, 3rd and 4th defendants are the registered owners of four individual parcels of land described as Lot 20 Block 34 Kemena Land District, Lot 21 Block 34 Kemena Land District, Lot 22 Block 34 Kemena Land District and Lot 23 Block 34 Kemena Land District, respectively. The 5th defendant is the Superintendent of Lands and Surveys, Land Department, Bintulu, Sarawak, who has jurisdiction over the said lands in dispute.

[3] The plaintiffs who are all natives of Sarawak and of the Iban tribe and are now residing at Rumah Madel, assert in the statement of claim that their claims are founded on native customary rights over land referred to as Native Customary Land, namely, the area shaded green in the map annexed to the statement of claim. The said land is locally known as "pemakai menoa". The boundary of the said land has been detailed under para. 7 of the statement of claim.

[4] The plaintiffs have pleaded that the native customary rights had been acquired or created before 1 January 1958 by their ancestors where they dwelled, occupied, cultivated, planted fruit trees and buried their dead, on the said land. The said land subsists as such until today. The basis of claiming such rights are stated in para. 8 of the statement of claim as follows:

Particulars

i. The Plaintiffs and/or their ancestors originated from the 2nd Division sometime in the 1870s to settle within the said Land. The Plaintiffs and or their ancestors settled and/or farmed the said Land and/or roamed its forests for food until today. The Plaintiffs shall detail their history at the trial of this action

ii. The Plaintiffs never abandoned their said land and they have been in continuous occupation of the same.

iii. The said land still subsists as it were, being the source of their livelihood, as a farming land, hunting ground and as stated under the particulars in paragraph 13 below.

[5] In paras 9, 10, 11, 12, and 13 of the statement of claim the plaintiffs have pleaded as follows:

9. The Plaintiffs claim that the 1st and/or 2nd and/or 4th Defendants and/or their servants or agents had been unlawfully issuing notices to the Plaintiffs to surrender their rights over the said Land and/or individual lands within the said Land, without any legal basis and/or in accordance with the provisions of the Sarawak Land Code.

10. The boundaries of the said Lots 20, 21, 22 are within the boundaries of the said Land and part of the boundary of Lot 23 overlapped with the boundary of the said Land (as reflected in the map attached marked "M").

11. The Plaintiffs claim that Lots 20, 21, 22, and part of Lot 23 that overlapped with the boundary of the said Land are an infringement and/or an impairment of the Plaintiffs' NCR over the said Land therefore the issuance of the said lots were unconstitutional and/or unlawful and/or improper.

12. Further and/or in the alternative the Plaintiffs claim that the issuance of the said Lots 20, 21, 22 and 23 to the 1st 2nd 3rd and 4th Defendants were unconstitutional and/or unlawful under Article 13 of the Federal Constitution and/or the same was not issued in accordance with the provisions of the Sarawak Land Code (Cap. 81) 1958.

13. Further and/or alternatively, the Plaintiffs state that have acquired rights over the said Land by virtue of the Plaintiffs' customs and/or adat and/or by virtue of principles of Common Law.

Particulars

i. the creation and/or acquisition of native customary rights over the said Land was in accordance with the Plaintiffs' custom;

ii. the Plaintiffs have for generations preserved this Land this said Land to meet their domestic needs; and/or

A iii. the said Land is the source of their livelihood where the Plaintiffs can roam to hunt wild animals and fish in the rivers and streams therein; and/or

iv. the Land is not only a source of life for the Plaintiffs but it constitutes life itself;

B v. the Plaintiffs are still in occupation of the said Land; and

vi. the Plaintiffs preserved this Land for the future generations of their community to ensure that their people survive.

C **[6]** The 1st, 2nd and 3rd defendants received the writ of summons and statement of claim on 28 March 2005 through individual pre-paid registered post. On 1 April 2005 they filed individual *ex parte* summons in chambers seeking leave to enter conditional appearance. A conditional appearance under O. 12 D r. 6 Rules of the High Court 1980 (RHC) is a prelude to an application under O. 12 r. 7 RHC to strike out the writ. A conditional appearance is a complete appearance to the action for all purposes subject only to the right reserved by the defendants to set aside the writ or service of the writ under O. 12 r. 7 RHC. E Upon obtaining leave to enter conditional appearance the solicitors for the said three defendants served the memorandum of conditional appearance on the solicitors for the plaintiffs on 2 April 2005 and thereafter, filed a summons in chambers together with an affidavit in support of Mr Yet Nai Sing, in which the 1st, 2nd F and 3rd defendants made a joint application for an order that the writ of summons and statement of claim be set aside or struck out. The said application was for all intents and purposes an application under O. 12 r. 7 RHC as well as an application under O. 18 r. 19 RHC.

G **[7]** The said 3 defendants relied on three basic grounds, that is:

i. The said writ dated 2 February 2005 is defective in reducing the prescribed period for entering the defendants' appearance in contravention of O. 12 r. 4(b) RHC.

H ii. The representative action of the plaintiffs is misconceived and not maintainable as the writ did not show or disclose the true names and identities of the persons whom the plaintiffs claimed to represent (the 79 family units or bilik).

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iii. The statement of claim dated 4 January 2005 discloses no reasonable cause of action, or it is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or it is otherwise an abuse of the process of the court.

[8] The learned High Court Judge at Bintulu dismissed the said application by the said three defendants on 13 September 2005 and hence, this appeal. The appellants and respondents before us shall be referred to as, the said three defendants and plaintiffs, respectively.

[9] The said three defendants abandoned the application to set aside the writ under O. 12 r. 7 RHC and therefore the appeal before us is only in respect of the application for the plaintiffs' action to be struck out under O. 18 r. 19 RHC.

[10] At the very outset we wish to state that the law and principles applicable to striking out actions under O. 18 r. 19 RHC are very clear and settled. The summary procedure should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 the Supreme Court held:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedures can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

[11] Bearing the above principles in mind, we shall approach this appeal by the said three defendants against the decision of the learned High Court Judge, dismissing the application in the following words:

> Having heard counsel and read the written submission – I ruled that there are serious issue for trial. The Defendant grounds are based merely on technical and procedural impropriety. However Court should have regard to substantial justice of the case in the light of the new O. 1A of the High Court Rule 1980. Therefore the 1st 2nd and 3rd application in enclosure 32 is hereby dismissed with cost. Cost to the plaintiff.

[12] We do not have the benefit of the written grounds of decision of the learned judge. It would appear from the above ruling greater emphasis has been given in his deliberation to that part of the application pertaining to the setting aside of the writ under O. 12 r. 7 RHC, which was incorporated in the same application under O. 18 r. 19 RHC. Nevertheless, we are of the view he had the principles set out in *Bandar Builder* in mind, as well, when he dismissed the said three defendants' application.

[13] The said three defendants thrust in arguing that the plaintiffs' action is unsustainable is based on the fact that the said three defendants are the registered owners of Lots 20, 21 and 22 and therefore under the provisions of s. 132(1) Sarawak Land Code (Land Code) they have thereby acquired indefeasible titles to the said Lots. What they have failed to appreciate is that the claim of the plaintiffs is also for declarations against the 5th defendant (Superintendent Lands & Surveys Bintulu Sarawak) who will have to furnish answers in relation to the central issue in this case touching on Native Customary Land, native customary rights therein and, the alienation of State land before all customary rights therein have been surrendered or terminated, or provisions made for compensating the persons entitled to such rights. It is to be noted that the 5th defendant has neither made any application to strike out the plaintiffs' action nor filed any affidavit in support of the said three defendants' application regarding the indefeasibility issue of their title, by reason of the fact the said lands were never Native Customary Land subject to any native customary rights, immediately before the issuance of the said Lots to the said three defendants.

[14] The indefeasibility issue will be a very critical issue of fact and law at the trial. Based on the statement of claim it may hinge on the evidence adduced by the plaintiffs and the 5th defendant on the issue of Native Customary Land and native customary rights asserted by the plaintiffs.

[15] Native Customary Land is interpreted at s. 2 of the Land Code to mean:

> (a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January, 1958, and still subsist as such;

(b) ...

(c) ...

(d) ...

[16] It would appear that under the Land Code, Native Customary Land may not be alienated.

> 13(1) Subject to the direction of the Minister under section 3(1A), the Director may alienate State Land, other than Native Customary Land.

[17] Under the Land Code, native customary rights are protected.

> 15(1) Without prejudice to section 18 and 18A, State land shall not be alienated until all customary rights therein have been surrendered or terminated or provision has been made for compensating the persons entitled to such rights.

[18] From the statement of claim it is clear that the plaintiffs are claiming that their native customary rights over the subject land have lawfully been created prior to the 1st day of January 1958 and still subsists as such land and it is thus Native Customary Land. The said three defendants have not shown that the plaintiffs have surrendered their native customary rights over the land. There is also no evidence adduced by the said three defendants that such native customary rights have been terminated or compensation has been paid to the plaintiffs.

[19] An application to strike out an action under O. 18 r. 19 RHC should not descend into a trial on affidavits. What the court should be concerned with is to determine whether the pleadings disclosed facts which merit a trial of the action. The plaintiffs' statement of claim herein certainly disclosed facts which merit a trial of the action.

[20] We are unanimous that this appeal be dismissed with costs. Deposit for this appeal to respondent on account of taxed costs.